Appendix F

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MICHAEL ANTHONY, Petitioner, vs. STEVEN CAMBRA, Warden, Respondent.	No. C 97-2232 FMS (PR) ORDER DENYING PETITION FOR A WRIT OF HABEAS CORPUS

Petitioner was convicted by a jury in San Mateo County Superior Court of the first degree murder of Ronald Ewing ("Ewing"), a business associate. The jury also found that petitioner conspired to murder Ewing and that the murder was carried out for financial gain. On June 1, 1990, petitioner was sentenced to life in prison without possibility of parole. He appealed. The California Court of Appeal affirmed the conviction on June 30, 1992 and the Supreme Court of California denied review on September 24, 1992. Nearly five years later, petitioner filed the instant federal petition for a writ of habeas corpus, which the court found stated a cognizable claim for relief under 28 U.S.C. § 2254 for violation of an agreement of immunity from prosecution. The Court accordingly ordered respondent to show cause why a writ of habeas corpus should not be granted. Respondent has filed an answer to the order to show cause and petitioner has filed a traverse.

Appendix F

FACTUAL BACKGROUND

The prosecution's theory of the case was that petitioner conspired with his business partner, Ronald McIntosh ("McIntosh"), and a hit man, Drax Quartermain ("Quartermain"), to have Ewing murdered. Several motives were offered for the murder, including that petitioner and McIntosh' company, a gold and silver futures telemarketing business called First International Trading Company ("FITC"), owed Ewing money and that Ewing had threatened to expose illegal business pratices of FITC to the Wall Street Journal and the Securities and Exchange Commission if he did not receive payment. The prosecution also showed that petitioner and McIntosh grew bitter about sharing a portion of FITC's profits with Ewing and that there was increasingly animosity towards him.

The prosecution's evidence was geared toward proving that petitioner actively participated in a conspiracy to hire Quartermain for $55,000 to kill Ewing and that petitioner delivered Ewing to Quartermain on a dark and isolated beach near Pacifica during the early morning hours of May 8, 1984, so the murder for hire could be carried out. While petitioner stood by, Quartermain shot and killed Ewing. Ewing's nude body was found washed ashore the next morning.

Several days later, petitioner went to the police and gave a statement implicating Quartermain but denying any participation in the murder itself. After an investigation that lasted several years, charges were brought against petitioner, Quartermain (the hit man) and McIntosh (petitioner's business partner).

The defense theory of petitioner's case was essentially in conformance with the statement petitioner gave the police after the murder. Petitioner told the police that after work on May 7, 1984, he and Ewing went to a few bars where they drank and

talked to women. Late in the evening, they called Quartermain, who petitioner described as a drug supplier, and made arrangements to meet him at Denny's in Pacifica so they could purchase cocaine. In the meantime, they went to a friend's house in Corte Madera and purchased and used cocaine, but not enough. They arrived at Denny's later and made arrangements to follow Quartermain so they could complete the deal and "party." Quartermain got into a station wagon with a woman driving, and Ewing and petitioner followed in petitioner's 1981 Corvette. After both cars pulled off the road, petitioner decided he was "getting real tired. Real pissed off. It's getting late, I've got to go to work." After seeking Quartermain's assurance that he would give Ewing a ride home, petitioner left. He later learned that Ewing had been shot and his body found washed up on the beach. The defense argued to the jury that petitioner had been "the pigeon, the fall guy, the dupe, the guy who's set up" by McIntosh to take the rap for Ewing's murder.

DISCUSSION

A. Standard of Review

This court may entertain a petition for a writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

The petition may not be granted with respect to any claim that was adjudicated on the merits in state court, however, unless the state court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Id. § 2254(d).

B. Claim for Relief

Petitioner contends that the prosecution violated an immunity agreement it made with him in exchange for information about the killing of Ewing and thereby violated his right to due process and privilege against self-incrimination. He specifically contends that the prosecution violated the agreement by using the information he gave them to uncover other incriminating evidence against him.

1. Agreement

On May 10, 1984, petitioner and his attorney met with two San Mateo Court sheriff's deputies, other law enforcement representative and a San Mateo County deputy district attorney. They entered into a four-page written immunity agreement, by which petitioner agreed to give the police information regarding Ewing's murder in exchange for immunity. The written agreement recited that petitioner was on federal and state probation and was not a suspect in the Ewing murder. It notably provided as follows:

> Based on the desire of MICHAEL ANTHONY to cooperate with the investigating homicide detectives and their need to obtain the information from him to locate and to bring to justice the perpetrator of the crime, it is agreed that there will be no state or federal prosecution of MICHAEL ANTHONY with regard to the killing of Ron Ewing provided MICHAEL ANTHONY is telling the truth when he represents that he is not the person who actually did the shooting of Ron Ewing and that he did not enter into an agreement prior to the killing with the perpetuator [sic] of the killing that the person was to kill Ron Ewing. Although it is not based upon the actual killing of Ron Ewing, it is agreed that provided he has been and continues to be truthful with regard to his knowledge of that killing, he will be given immunity

> from any state and/or federal prosecution based upon that homicide.

The parties also memorialized the agreement on tape before petitioner provided any information. The deputy district attorney summarized the agreement: "The understanding generally being by the parties that if [petitioner] cooperates and provides truthful information and was not a principal in the homicide, he then will not suffer any prosecution." Petitioner at this point interjected, "Uh, at that meeting also that you said that I want it on tape. That you, that you have said and I feel that when we bring this guy to trial that possibly he's gonna try to point his finger at me and, as a last result. Is that how you say that?"

The assistant district attorney responded by summarizing a critical aspect of the agreement:

> Okay. It's anticipated that, that based upon the recitals and what limited conversations we've had with the witness and his attorney, Mr. Iverson, that the potential suspect, referred to as the perpetrator in the agreement, may well indicate that the witness, in fact, was the person who actively participated in the crime. It's also my understanding from our limited conversations that present at the scene of the departure was a third person. Possibly a female subject. It's the understanding of the District Attorney that the accusations, if any, to be made by those two people, toward yourself, would not constitute a basis for violating this agreement.

The assistant district attorney then stressed: "And that you understand that at some future date and time we develop independent evidence that you, in fact, were an active participant in the crime, a principal, why then all the information which you're providing us today can be used to prosecute you? Do you know?" Petitioner replied, "I

understand that." Mr. Iverson, petitioner's attorney, then added. "But that's correct and with, and we've also discussed the fact that the evidence is more than simply this gentleman and his girlfriend or whoever she was, coming forward and trying to involve [petitioner] . . . We require some sort of corroborating evidence." Petitioner replied, "Okay, I understand that. I understand that, sir."

2. State court proceedings and rulings

Petitioner moved to dismiss the case against him at the preliminary hearing on the ground that the district attorney promised to use only "independent evidence" to show petitioner's involvement in the killing. Petitioner argued that because all of the prosecution's witnesses were in one way or another the fruit of his 1984 statement, the prosecution was not using "independent evidence" to show that he hired the killer. The magistrate rejected petitioner's interpretation of the immunity agreement and ruled that the phrase "independent evidence" meant only evidence independent of any accusation made by Quartermain and the woman with him at the time of the killing (Debra Chandler), not evidence independent of petitioner's statement. The court also found that independent testimony of other prosecution witnesses, namely that of David Younge, owner of a venture capital company which employed Quartermain as a consultant, supported the inference that petitioner indeed was involved in an agreement to have Ewing murdered. The court therefore concluded that petitioner had not been truthful in his statement to the police and thereby violated the immunity agreement.

Petitioner renewed his motion to dismiss in superior court, but the court agreed with the magistrate that petitioner had breached the immunity agreement. On appeal, petitioner once again argued that the phrase "independent evidence" in the agreement precluded the prosecution from using any evidence

obtained through his statement to prove his guilt at trial. The Court of Appeal rejected his argument:

> [Petitioner's] interpretation of the phrase "independent evidence" is strained. When the phrase is read in context, it is clear the immunity agreement contemplated the prosecution could pursue any information provided by [petitioner]. The agreement contemplated only that [petitioner's] immunity would not be abrogated simply on the uncorroborated accusations of the two persons present at the scene of the murder. If the prosecution developed evidence of [petitioner's] involvement in the murder "independent" of the uncorroborated accusations of these two persons, then [petitioner] could be prosecuted based on all the evidence the prosecution could muster- -including the information provided in his statement. In other words, the "independent evidence" referred to in the agreement is evidence independent from the accusations of the perpetrator and his companion, not evidence independent from witnesses and leads developed from [petitioner's] statement.

People v. Anthony, No. A050121, slip op. at 13-14 (Cal. Ct. App. June 30, 1992) (Resp't Ex. J).

3. Analysis

Immunity issues usually arise when a defendant refuses to testify before a court on Fifth Amendment grounds. The government may compel the testimony over the defendant's claim of the privilege against self-incrimination, if it grants immunity to the defendant under an appropriate immunity statute. See Kastigar v. United States, 406 U.S. 441, 448 (1972)

(upholding constitutionality of immunity statutes).[2] In federal criminal cases, the government may compel testimony by granting use and derivative use immunity to the defendant under 18 U.S.C. § 6002. "Use immunity" means that the compelled statements cannot be used against the defendant. See United States v. Plummer, 941 F.2d 799, 803 (9th Cir. 1991). "Derivative use immunity" means that the government must derive all the information used as the basis for any prosecution of the defendant from sources wholly independent of the defendant's statements. See id. The government may not use the statements to uncover other incriminating evidence, focus the investigation, decide to initiate prosecution, interpret other evidence, or otherwise plan trial strategy. See United States v. Montoya, 45 F.3d 1286, 1295 (9thCri.), cert denied, 516 U.S. 814 (1995).

When, as in this case, the defendant has not been forced to testify and so has not claimed the Fifth Amendment privilege against self-incrimination, the government can grant him varying degrees of immunity in an informal agreement. See United States v. Dudden, 65 F.3d 1461, 1467 (9th Cir. 1995); see also United States v. Camp, 72 F.3d 759, 762 (9th Cir. 1995) (informal immunity agreement has no more effect than cooperation agreement), cert. denied, 517 U.S. 1162 (1996). If the government informally promises that the statements will not be used against the defendant, it is precluded from using the statements to uncover other incriminating evidence, unless the agreement expressly provides otherwise. See Dudden, 65 F.3d. at 1467. The issue therefore is one of interpreting the informal immunity agreement. See United States v.Mendoza, 78 F.3d

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2. Congress and every State in the Union, as well as the District of Columbia and
Puerto Rico, have passed one or more immunity statutes. See Kastigar, 406 U.S. at 447
& n. 18.

460, 464 (9th Cit. 1996). Such agreements are interpreted using ordinary contract principles. See id.; Dudden, 65 F.3d at 802.

The California Court of Appeal carefully reviewed the written agreement and accompanying tape memorializing the agreement and rejected petitioner's interpretation that his statement could not be used to uncover other incriminating evidence. The court concluded that the only condition on the use of petitioner's statement was that it could not be used against him if the only evidence linking petitioner to Ewing's death was the uncorroborated accusations of Quartermain and Chandler. See People v. Anthony, No. A050121, slip op. at 14 (Cal. Ct. App. June 30, 1992). The court reasoned that the whole point of the immunity agreement was that immunity would be revoked if there was a factual determination that petitioner was lying and had, in fact, hired the triggerman. "Such a factual determination was made based upon evidence obtained independent from any accusations made by Quatermain and/or Chandler. At that point, the conditions placed on [petitioner's] immunity were breached, and all the evidence- -including evidence developed from [petitioner's] statement to the police- -could be used to prosecute him." Id. at 15.

The California Court of Appeal's decision was a reasonable application of law to the facts of the case. Under 28 U.S.C. § 2252(d), petitioner is entitled to habeas relief on his claim that the government violated the immunity agreement in violation of his right to due process only if the state court's decision rested on an unreasonable application of law to the facts of the case. See Drinkard v. Johnson, 97 F.3d 751, 768 (5th Cir. 1996) (citing 28 U.S.C. § 2254(d)), cert. denied, 117 S. Ct. 1114 (1997). An application of law to facts is unreasonable only when it can be said that reasonable jurists considering the question would be of one view that the state court ruling was incorrect. See id. at 769. This cannot be said here. The California Court of Appeal's carefully-reasoned decision is not

so clearly incorrect that it would not be debatable among reasonable jurists. See id. Petitioner is not entitled to habeas relief on his due process claim.

Nor is petitioner entitled to relief on his claim that the immunity agreement violated his privilege against self-incrimination. Petitioner was not required to testify. He testified pursuant to an agreement entered into freely on his own initiative and for his own purposes. Petitioner was free to agree to conditions that could not have been imposed upon him and had he chosen to claim his Fifth Amendment privilege. See United States v. Irvine, 756 F.2d 708, 712 (9th Cir. 1985). As long as petitioner had the option to remain silent, his statement cannot be considered involuntary. See Camp, 72 F.3d at 761.[3]

CONCLUSION

For the foregoing reasons, the petition for a writ of habeas corpus is DENIED.

SO ORDERED.

DATED: _____

_____
FERN M. SMITH
United States District Judge

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3. Certain cruel choices, and choices made in highly coercive circumstances, are proscribed by the Fifth Amendment even though the state, strictly speaking, does not compel an incriminating statement. But nothing in the record here suggests that any negative consequences would have followed if petitioner had invoked the privilege and remained silent. See Camp, 72 F.3d at 761-62.

Appendix F

FILE COPY

United States District Court
for the
Northern District of California
January 20, 1999

* * CERTIFICATE OF SERVICE * *

Case Number : 3:97-cv-02232

Anthony
vs
Cambra

I, the undersigned, hereby certify that I am a employee in the Office of the Clerk , U.S. District Court, Northern District of California.

That on January 20, 1999, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

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Appendix F

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Richard W. Wieking, Clerk

BY: _____
Deputy Clerk

APPENDIX G

Appendix G

S060848

IN THE SUPREME COURT OF CALIFORNIA

IN RE MICHAEL ANTHONY

ON

HABEAS CORPUS

Petition for writ of habeas corpus is DENIED. (*In re Swain* (1949) 34 Cal.2d 300, 304; *In re Clark* (1993) 5 Cal.4th 750; *In re Dixon* (1953) 41 Cal.2d 756, 759; *In re Lindley* (1947) 29 Cal.2d 709, 723.)

Chief Justice